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Room #307

PATENT  
30203/37263

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: Frick et al.

Serial No: 09/905,736

Filed: July 13, 2001

## Title: Optical Switch with Moveable Holographic Optical Element

Group Art Unit: 2873

Examiner: J. Dinh

) I hereby certify that this paper is being  
) deposited with the United States Postal  
) Service as first class mail, postage prepaid,  
) in an envelope addressed to: Commissioner  
) for Patents, P.O. Box 1450, Arlington, VA  
) 22313-1450 on this date:

October 1, 2003

Paul B. Stephens  
Registration No. 47,970

**PETITION FOR REFUND**

Commissioner for Patents  
P.O. Box 1450  
Arlington, VA 22313-1450

Sir:

By the undersigned representative, the Applicants respectfully petition the Director for Patents under 37 C.F.R. §1.182 for a refund of the filing fee accompanying the Request for Continued Examination (“the RCE”) filed on September 18, 2003. The RCE was necessitated by fault of the Patent Office, specifically by the Examiner’s issuance of a notice of allowance without consideration of art that was properly presented to the Patent Office over two months before the mailing of the notice of allowance.

This case was filed on July 13, 2001. On November 26, 2002, the first official action was mailed. A response to that office action was timely filed on March 26, 2003, along with a petition for a one month extension of time. A supplemental information disclosure statement, and Form PTO-1449, was also submitted on that same day. On April 1, 2003, a second supplemental information disclosure statement, and another Form PTO-1449, were mailed, including the fee set forth under 37 C.F.R. §1.97(c). *Ex. A.* This second

supplemental information disclosure statement cited an international search report and the references cited therein. The second supplemental information disclosure statement was received by the patent office on April 7, 2003. *Ex. B.* Over two months later, on June 18, 2003, the examiner mailed a notice of allowance. *Ex. C.* The notice included the marked-up supplemental information disclosure statement of March 26, 2003, but no indication that the second supplemental information disclosure statement (April 1, 2003) had been considered.

Upon finding no marked-up second supplemental, Applicants' representative contacted the Examiner to inquire as to the status of the review of the information cited therein. The Examiner indicated that the second supplemental information disclosure statement had not been reviewed prior to the Notice of Allowance, although it was mailed well before the mailing of the notice of allowance. The Examiner stated that the submission had never been placed in the file, suggesting that it may have been lost by the Patent Office.

On August 5, 2003, in an attempt to have the properly-cited information considered, Applicant's representative filed a Petition for Consideration of Information Disclosure Statement, Pursuant to 37 C.F.R. §1.97(c). The Petition is attached (in full) at Exhibit D, for your convenience. *Ex. D.* The Petition was received by the Patent Office on August 7, 2003. *Ex. E.* The Petition identified the problem and the Patent Office's error in not considering the submitted prior art. Applicants' representative again contacted the Examiner to apprise him of the Petition and the pending final due date for payment of the issue fee, September 18, 2003. The Petition specifically requested as follows:

The issue fee for this case is due by September 18, 2003. Therefore, Applicants respectfully request the grant of this Petition and the mailing of a second notice of allowance or action on the merits before September 18, 2003. The Applicants further request that the Examiner contact the below-signed representative by telephone advising him when the mailing has been sent.

Applicants' representative contacted the Examiner in early September to inquire into the status of the art review. The Examiner indicated that the information on the second

supplemental information disclosure statement was to be reviewed. The Examiner indicated that he would seek to complete such review before the September 18, 2003 deadline.

Applicants' representative attempted to contact the Examiner during the waning days prior to the 18<sup>th</sup>, including a call to the Examiner on the 18<sup>th</sup>. That telephone call was not returned. With no indication of further action by the Patent Office and an application that was about to go abandoned for lack of payment of the issue fee, Applicants' representative begrudgingly filed the RCE on September 18, 2003, along with the required fee.

To this day, Applicants have received no indication that the second supplemental information disclosure statement has been considered and no indication that the Petition has been granted.

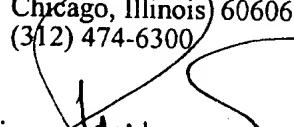
Applicants now request refund of the RCE fee, as it was necessitated purely by Patent Office error in failing to timely consider the second supplemental information disclosure statement and the petition regarding the same.

The Commissioner is hereby authorized to charge the petition fee set forth in 37 C.F.R. §1.17(h) of \$130.00 to Deposit Account No. 13-2855. A duplicate of this paper is enclosed.

Respectfully submitted,

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By:

  
Paul B. Stephens  
Registration No. 47,970

October 1, 2003